Supreme Court, U.S.
FILED
JUL 24 1992
OFFICE OF THE CLERK

No. 91-2056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BEA JACOBSON, *et al.*,
Petitioners,

v.

CINCINNATI BOARD OF EDUCATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF CINCINNATI BOARD OF EDUCATION, *ET AL.*, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Sixth Circuit properly found that the Board's staff racial balance policy which provides for the assignment of teachers to schools to achieve racial balance within the faculty of each school that reflects within 5% the percentage of minority teachers throughout the school system was a specific race neutral policy not subject to the strict scrutiny analytical framework set forth in *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and that such policy did not violate the Fourteenth Amendment of the United States Constitution or 42 U.S.C. Sec. 1983 since it was substantially related to an important governmental objective.

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BRIEF OF CINCINNATI BOARD OF EDUCATION, *ET AL.*, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

On January 14, 1974, the Cincinnati Board of Education ("the Board") adopted a policy on staff racial balance which provided that the teaching staff at each school would have a racial composition within 5% of the minority teacher representation within the entire school district at the relevant grade-level (primary or secondary). The Board adopted this policy due to its concerns about racial isolation within the school district and as a way to ensure that black and white students in the district would receive a quality integrated education and would be taught by both black and white teachers. The Board's

policy on staff racial balance has been examined on two occasions by the Ohio Civil Rights Commission, a deferral agency under Section 706 of Title VII of the Civil Rights Act of 1964, and in both instances the policy has been found lawful (Board Exs. A, B, C).

In May of 1974, a group of Cincinnati public school students and their parents filed suit against the Board, alleging that the Board was unlawfully operating a dual, segregated public school system. The plaintiffs in that suit alleged that Cincinnati public school officials violated the equal protection clause of the Fourteenth Amendment by engaging in deliberate acts of segregation and discrimination. After 10 years of litigation, the lawsuit was resolved when a settlement agreement negotiated between the Board and the plaintiffs was adopted by the District Court as a consent decree. *Bronson v. Board of Education*, 604 F. Supp. 68, 82 (S.D. Ohio 1984).[1]

The Settlement Agreement, as part of the consent decree, provides:

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[1] During the course of the *Bronson* litigation, the parties litigated the question of the preclusive effect of *Deal v. Cincinnati Board of Education*, 419 F.2d 1387 (6th Cir. 1969), *cert. denied*, 402 U.S. 962 (1971), in which the Sixth Circuit found that the Board had not discriminated on the basis of race in the hiring or assignment of teachers. As a result of the Sixth Circuit's decisions in *Bronson v. Board of Education of the City School District of the City of Cincinnati*, 525 F.2d 344 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976) and *Bronson v. Board of Education of the City School District of the City of Cincinnati*, 687 F.2d 836 (6th Cir. 1982), the plaintiffs were precluded from attempting to prove that, prior to July 26, 1965 (the date of the *Deal* decision), the Board acted with segregative intent with respect to the administration of the Cincinnati Schools or that it failed to take affirmative steps to eliminate a dual system in Cincinnati. The plaintiffs were not precluded from asserting that Board conduct post 1965 violated their Fourteenth Amendment rights. Therefore, the students and their parents were entitled to proceed with their lawsuit alleging that the Board was unlawfully operating a segregated public school system.

5. *MAINTAINING STAFF RACIAL BALANCE*

> The Cincinnati Board of Education currently has in force a policy which requires that the staff in each of its schools has a racial composition which is within 5% of the racial composition of the staff in the district as a whole. The Board shall maintain that policy in effect and take the steps necessary to assure that it is enforced.

With the incorporation of paragraph 5 of the Settlement Agreement into the *Bronson* Consent Decree, the Board's voluntary staff racial balance policy became an order of the District Court. 604 F. Supp. at 82. Furthermore, the Board was required by order of the Court to take necessary steps to assure that the policy was maintained and enforced. *See id.* at p. 80; (*See also* District Court Opinion below, which is included in the appendix to Plaintiffs' Petition for a Writ of Certiorari, pages 6a-29a, at p. 10a).

In evaluating the proposed settlement agreement in the *Bronson* case, the District Court noted that the question before it was whether the proposed settlement agreement was "a fair, reasonable and adequate resolution of the plaintiffs' allegations." *Id.* at 73. Finding that the proposed settlement met those standards, the District Court stated that "[a]doption of the settlement agreement will speed the process of ending racial isolation in the Cincinnati schools." *Id.* at 73.

The *Bronson* Consent Decree does not require "forced busing" as a way to avoid racial isolation within the Cincinnati Public Schools. Instead, as explained by the District Court:

> *The heart of the Agreement is that the district will, over the next seven years, continue to reduce racial isolation by the use of new and expanded alternative schools* supported by a commitment of $35 million in state funds, over and above Cincinnati's normal state aid. Open enrollment will continue to be available

> as a means of reducing racial isolation, and a strong program of remedial education will be instituted in low achieving schools. There is cause to believe that the wide variety of voluntary choices available under the settlement will make it unnecessary for any child to ride a bus except by choice. Instead of dictating the methods to be used in reducing racial isolation, the Agreement establishes certain standards to be reached over the seven-year term and leaves with the school district the authority to select the methods of meeting that responsibility.

604 F. Supp. at 75 (emphasis added).

The staff racial balance policy challenged in this case limits the ability of teachers to transfer voluntarily from one school to another if the transfer would adversely affect the racial balance of either the school being transferred from or the school into which the transfer is desired. The policy also permits the involuntary transfer of teachers from one school to another where necessary to implement the staff racial balance policy.

Significantly, as the District Court noted in its Findings of Fact, "The staff racial balance policy does *not* affect the hiring, discharge, salary or promotion of any teacher." For example:

> 14. . . . a teacher would not be denied a promotion even if the promotion caused him or her to change schools and, thereby, caused one or the other or both of the schools to become out of compliance or even further out of compliance with the policy.
>
> 15. The staff racial balance policy is race conscious generally, but it is *specific race neutral*. It is race conscious in that it can determine the school or schools at which a teacher can teach solely on the basis of his or her race. It is specific race neutral in that there is no disparate impact as to race in its application. It is applied equally to both black and white teachers. In some instances, it will benefit or

> harm white teachers; in others, it will benefit or harm black teachers.

(District Court Opinion at p. 11a-12a).

The Plaintiffs in this case include six black teachers who have requested to transfer from their current assignments at alternative schools, but whose transfer requests have been denied due to the Board's policy on staff racial balance. At the time the teachers requested transfers, their schools were not in compliance with the policy. The departure of any of these Plaintiffs would have caused their schools to be further out of compliance. The remaining Plaintiffs are two white teachers who were administratively transferred from their assignment at a school that is being converted to an alternative school in order to improve the staff racial balance at that school. It is undisputed that each of the individual Plaintiffs is a well-qualified teacher who has received good performance evaluations.

It is also undisputed that the alternative school program is the "heart" and the "backbone" of the Board's commitment to reduce racial isolation under the consent decree. *Bronson, supra*, 604 F. Supp. at 75, 76. The Board's policy of maintaining a racially balanced staff at each school is an important and educationally sound policy aimed at avoiding racially identifiable schools and at exposing all students to both black and white teachers as part of their quality integrated education.

During the period this matter was pending before the Sixth Circuit, the Board and the CFT negotiated a new collective bargaining agreement which became effective June 28, 1991. In that agreement, the parties agreed that effective the 1992-93 school year, "no teacher shall be denied a transfer for more than two consecutive years based on the racial balance at his/her current school" (Collective Bargaining Agreement § 250, ¶ 11). The parties agreed that this provision would be effective upon its approval by the *Bronson* district court or upon a

determination that the Board had satisfied its obligations under the *Bronson* Consent Decree. On February 4, 1992, the District Court issued such a decision, which dissolved its jurisdiction over the provision of the consent decree relevant to staff racial balance (Section 5, see p. 3 above). The Board subsequently has modified its policy to permit variances of plus or minus *ten* percent and to recognize that in a particular school year, circumstances may result in a number of schools being out of compliance. Consequently, the modifications to the collective bargaining agreement and the policy itself have made it much less likely that a teacher will be either denied transfer opportunities or involuntarily transferred due to staff racial balance concerns.

SUMMARY OF ARGUMENT

In their petition for a writ of certiorari, the Plaintiffs allege that the Sixth Circuit erroneously concluded that the Board's racial balance policy was "specific race neutral" and therefore erroneously subjected the policy to an intermediate level of scrutiny as opposed to the strict scrutiny analytical framework set forth in this Court's opinions in *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In making this argument, the Plaintiffs acknowledge that the Board's racial balance policy burdens both African-American and white individuals, but argue that the policy is not "specific race neutral" since it does not affect both classes of teachers in the same way. In this regard, Plaintiffs allege that the policy "works to trap minority teachers in . . . school assignments calling for specialized training" while keeping "otherwise qualified white teachers from such positions." These resulting racial classifications, the Plaintiffs assert, must be evaluated under a strict scrutiny standard—a standard the Plaintiffs allege the policy cannot meet. While the Plaintiffs recognize that the Board's staff racial balance policy has been incorporated into the

Bronson Consent Decree, they assert that the decree cannot serve as justification for the policy. Plaintiffs argue that the *Bronson* Consent Decree exceeded the scope of permissible remedies since the Sixth Circuit found in *Deal* that the Board had not discriminated in the hiring and assignment of its teachers.

The Plaintiffs' argument misses the mark in several key respects. Initially, it is important to realize that the Board's racial balance policy does not create racial classifications. Rather, as the District Court found, and the Sixth Circuit affirmed, the Board's racial balance policy is

> specific race neutral in that there is no disparate impact as to race in its application. It is applied equally to both black and white teachers. In some instances, it will benefit or harm white teachers; in others, it will benefit or harm black teachers.

Jacobson v. Cincinnati Board of Education, 961 F.2d 100, 102 (6th Cir. 1992). Thus the policy is significantly different than policies creating a racial preference such as the ones in *Wygant* and *Croson* where a strict scrutiny standard applies. Furthermore, the right at issue in this case—to be assigned to teach in the school of one's choosing—does not rise to the level of rights at issue in *Wygant* and *Croson* where strict scrutiny analysis was applied.

The Plaintiffs' argument also ignores well-settled law that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. County School Board*, 391 U.S. 430, 437-438 (1968). Furthermore, the Board's staff racial balance policy is the exact type of policy which this Court endorsed in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) as an affirmative step toward a unitary system. Finally, the policy has been incorporated into the *Bronson* Consent Decree. Thus, as the District Court pointed out, "the staff racial balance policy in question is no longer a

voluntary one; rather it is an order of this Court. Accordingly, it is authorized by *Swann*" (District Court opinion at 25a).

REASONS FOR DENYING THE PETITION

I. THERE IS NEITHER CONFLICT NOR CONFUSION CAUSED BY THE SIXTH CIRCUIT OPINION

A. The Sixth Circuit's Opinion is Consistent with this Court's School Desegregation Rulings

In 1974 the Board implemented a policy on staff racial balance which provided that the teaching staff at each school would have a racial composition within 5% of the minority teacher representation within the entire school district at the relevant grade-level. Ten years later, that policy was incorporated into a District Court Consent Decree resolving a lawsuit filed in 1974 alleging that the Board had maintained a dual school system through various means including staff and faculty assignment.

It is well settled that a court may use race-conscious means of assigning teachers to remedy a dual school system. *See United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969); *Columbus Board of Education v. Penick*, 443 U.S. 449, 467 (1979). In a unanimous decision, the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), specifically rejected the argument that race-conscious teaching assignments may not be used as part of the remedy in desegregating a dual system. 402 U.S. at 19. The Court stated:

> [W]here it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

402 U.S. at 18.

It is further well settled that parties to a school desegregation action are permitted to settle the case through a consent degree. *See, e.g., Swann, supra; Freeman v. Pitts*, —— U.S. ——, 112 S. Ct. 1430 (1992).

Plaintiffs discount the legal effect of the consent decree contending that the decree went beyond permissible scope in fashioning a remedy by including the staff racial balance policy since the Sixth Circuit had previously held in *Deal v. Cincinnati Bd. of Educ.*, 419 F.2d 1387 (6th Cir. 1969), that the Board had not discriminated in the assignment of teachers. Plaintiffs' argument has no merit.[2]

The *Bronson* plaintiffs brought an action against the Board alleging that the Board maintained a dual school system through various means, including staff and faculty assignment policies. To remedy the plaintiffs' allegations

[2] The District Court, in dismissing the Plaintiffs' argument that the *Bronson* Consent Decree is somehow less enforceable because it was entered into absent a finding of past discrimination, stated:

> *Swann* and its progeny allow for the racially-balanced assignment and transfer of teachers by means of a plan such as the one under consideration without either a finding of past discrimination in the assignment of and transfer of teachers or a narrowly-tailored remedy to address that discrimination. This is true even if there has been no prior finding of a dual school system, either *de jure* or *de facto*. This Court is aware of no authority which would suggest that school desegregation cases may not be voluntarily resolved. On the contrary, that type of lawsuit which has the potential of polarizing a community is most appropriately resolved through a voluntary settlement which is enforced through a consent decree. Therefore, the staff racial balance policy is enforceable even though it is part of a consent decree. This is particularly true here where the Plaintiffs supported the adoption of the challenged policy into the consent decree. Similarly, the Court rejects Plaintiffs' argument that the Sixth Circuit's conclusion in *Deal v. Cincinnati Board of Education*, 419 F.2d 1387, 1393-94 (6th Cir. 1969), that the Board was not discriminating in the assignment of teachers, alters the applicability of *Swann*.

District Court Opinion at 24a.

of a dual school system, the consent decree incorporated the Board's staff racial balance policy. In both *Montgomery County Bd. of Educ.*, *supra*, and *Swann*, *supra*, relief directed at the integration of faculties was sought on behalf of school-children plaintiffs in order to remedy the segregation of students. This Court has "long recognized that . . . student segregation and faculty segregation are often related problems." *Freeman v. Pitts*, —— U.S. ——, 112 S. Ct. 1430, 1449 (1992). Furthermore, "[t]he components of a school desegregation plan are interdependent upon, and interact with, one another, so that changes with respect to one component may impinge upon the success or failure of another." *Freeman*, *supra* at 1449, citing *Vaughns v. Bd. of Educ. of Prince George's County*, 742 F. Supp. 1275, 1291 (D. Md. 1990). In dismissing a similar contention that a faculty assignment plan could not be considered remedial given a prior court finding of no discrimination in teacher assignment, the *Vaughns* court stated:

> [P]laintiffs' suggestion . . . misidentifies the true nature of the Fourteenth Amendment offense at issue here. The principal constitutional compulsion driving this litigation since 1972 lies in the injury to students from the perpetuation of a dual school system, not from employment discrimination against teachers in the County. To disestablish that system and vindicate the rights of school children, the Board can validly implement race-conscious faculty policies even in the absence of employment discrimination against teachers, provided that those policies serve the critical interest of reducing the racial identifiability of individual schools.

Id. at 1292. As Justice O'Connor stated in agreeing with the plurality opinion in *Wygant v. Jackson Board of Education*, "a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan." 476 U.S. at 289 (O'Connor, J. concurring).

B. The Sixth Circuit Opinion is Consistent with and Supported by Other Lower Court Opinions Addressing the Validity of Similar Faculty Assignment Policies

Numerous federal courts, faced with similar race-conscious staff assignment policies in public school systems, have found no constitutional violation. In *Kromnick v. School District of Philadelphia*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 469 U.S. 1107 (1985), the Third Circuit upheld the Philadelphia school district's policy of maintaining a faculty ratio at each school of 75% to 125% of the system-wide proportion of white and black teachers. The school district's policy, like that in the present case, had an impact on teachers of both races and did *not* affect hiring, promotions, raises or layoffs.

> The challenge is to a policy that only affects assignment of teachers to schools. Ordinarily this is a function within the exclusive prerogative of the school district, unless a collective bargaining agreement imposes restrictions. In this instance, however, the collective bargaining agreement incorporates the 75% 125% policy, and has done so year after year. Since the program is racially neutral, requiring the transfer of both black and white teachers, and there has been no showing of disparate impact upon one race, it is questionable whether the policy is one effecting a discrimination of constitutional dimension.

739 F.2d at 902-903. The challenged faculty-assignment policy was the result of a consent decree entered into between the state and the Philadelphia School District. *Id.* at 897.

In *Zaslawsky v. Board of Education, Los Angeles*, 610 F.2d 661 (9th Cir. 1979), the Ninth Circuit considered a similar constitutional challenge by teachers to the Los Angeles Board's "staff integration plan," which had as its goal that:

> each school's faculty makeup reflect, within a range of plus or minus ten percent, the district-wide com-

> position of thirty percent racial and ethnic minorities and seventy percent non-minorities.

610 F.2d at 662. The plan provided for both voluntary *and* mandatory transfers. The plaintiff-teachers argued that a race-conscious transfer plan is permissible *only* when there has been a judicial finding of *de jure* segregation. The court, however, explicitly and emphatically rejected this argument, noting that "the Supreme Court has approved of various kinds of race-conscious plans in the absence of such findings." 610 F.2d at 663-664. The Ninth Circuit held:

> The school district is not precluded from taking voluntary action to obtain better racial balance in its teaching faculty. . . .
>
> The action of the school board was not directed toward the employment opportunities available to teaching faculty nor the elimination of any past discrimination in employment. . . . The focus of this action of the school board was to *enhance the educational opportunities available to the students by achieving better racial balance in the teaching faculty* throughout the district. This is an educational objective which has been well recognized and approved by the Supreme Court.

610 F.2d at 664 (emphasis added).

In *Vaughns v. Board of Education of Prince George's County*, 742 F. Supp. 1275 (D. Md. 1990), the district court upheld a teacher assignment and transfer policy that was, in pertinent part, very similar to the policy that is challenged in the present case. Despite a 1983 court finding that there had been no vestiges of discrimination with respect to faculty assignments since 1973, the *Vaughns* court upheld the policy which, like the Cincinnati policy, included a teacher assignment goal that established a minimum and maximum range for black faculty representation at each school. *Id.* at 1280. The Prince George's County policy also included a seniority

override goal that permitted a waiver of the "last in, first out" principle during staff reductions in order to maintain minority faculty representation. *Unlike* the racial balance policy in the present case which is tied to the District-wide teaching staff, the *Vaughns* seniority override was tied to the racial composition of the county population as a whole. *Id.* at 1305. The *Vaughns* court concluded that the seniority override goal had to be amended to reflect the racial composition of the county-wide teaching staff; the same benchmark which the Cincinnati racial balance policy has always used. *Id.*

In the Prince George's County Schools, the desegregation plan relies heavily on "magnet" or alternative schools, just as the *Bronson* Settlement Agreement does. The *Vaughns* court described the importance of the faculty assignment policy to the magnet schools program:

> In this litigation the avoidance of racially identifiable faculties is critical to a desegregation plan like that of Prince George's County which relies heavily on magnet schools. The success of magnet programs, after all, depends on parental choices which in turn may be shaped by perceptions of the characteristics of faculty. Curtailing the Board's power with respect to faculty assignments might result in consequences beyond the resegregation of faculties and could well threaten the success of the overall school desegregation program. If the Board is barred from taking measures in the realm of faculty assignments (or any other of the six *Green* aspects for which no constitutional violation is outstanding), then it could be left with the sole option of altering student assignment policies.

Id. at 1292. The success of the alternative school programs in the Cincinnati School District is equally dependent upon voluntary parental choices that may be negatively influenced by racially identifiable faculties.

As the above establishes, the Sixth Circuit's opinion is consistent with, and supported by, the decisions of other

federal courts which have addressed the validity of faculty racial balance policies.[3] The Plaintiffs have not cited any authority to the contrary. Rather, they assert that because these cases pre-date *Wygant* and *Croson*, they are no longer good law. However, as discussed in Part C, below, *Wygant* and *Croson* do not apply to constitutional scrutiny of a staff racial balance policy such as the Board's.

C. This Court's Decisions in *Wygant* and *Croson* Do Not Require the Board's Staff Racial Balance Policy to be Evaluated Under a Strict Scrutiny Standard

Plaintiffs contend that the staff racial balance policy results in racial classifications and therefore the policy must be evaluated under the strict scrutiny analytical framework of this Court's decisions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). To the contrary, the Sixth Circuit correctly concluded that the strict scrutiny analytical framework set forth in *Croson* and *Wygant* does not apply to the instant case.

The plans challenged in *Croson* and *Wygant* are fundamentally different from the policy in this case. Both *Croson* and *Wygant* involved voluntary *race-preference*

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[3] *See also, Caulfield v. Bd. of Educ.*, 632 F.2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981), where the Second Circuit upheld a faculty assignment plan which required that each school's faculty reflect, within five percentage points, the racial and ethnic composition of the teacher population systemwide as a reasonable and valid effort to comply with Titles VI and IX; and *Bolin v. San Bernadino City Unified School District*, 155 Cal. App. 3d 759, 202 Cal. Rptr. 416 (4th Dist. 1984), where a California state court upheld a plan requiring that each school maintain a minority faculty composition of not less than half or more than twice the district wide ratio of 29% on the grounds that the plan was a valid exercise of the school board's discretion in promoting integration and did not discriminate on the basis of race, but rather required that assignment of teachers be reasonably balanced throughout the school system.

plans under which one racial group was treated more favorably than another. In *Croson*, a contractor challenged a city council "set-aside" ordinance that required non-minority-owned prime contractors for city construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more minority business enterprises. 488 U.S. at 477. The policy challenged in *Wygant* was a collective bargaining provision that extended preferential protection against layoffs to minority teachers at the expense of non-minority teachers with more seniority. 476 U.S. at 269.

In contrast, the staff assignment policy under attack in the present case does not give preference to any racial group. Instead, *it is race-neutral*: it affects minority teachers as well as non-minority teachers. Indeed, the Plaintiffs challenging this policy include both white and black teachers. Second, the policy affects *only* the determination of school assignments; it does not affect hiring, firing, layoff, or promotional decisions. In *Croson*, the plan affected city contracting decisions while in *Wygant* the provision concerned layoffs. In *Wygant*, the plurality opinion concluded that "[d]enial of a future employment opportunity is not as intrusive as loss of an existing job," and noted that in cases addressing layoffs under union seniority plans, the adversely affected employees are "typically heavily dependent on wages for their day-to-day living." 476 U.S. at 282-83. In the present case, the Plaintiff teachers have suffered no material adverse financial effects.

Plaintiffs' contention that *Croson* and *Wygant* apply here suggests that this Court, without expressly mentioning *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, in either *Croson* or *Wygant*, intended those decisions to overrule Swann and other well-settled law endorsing faculty assignment plans, such as the one in question here, as part of a plan to settle desegregation suits. As the *Vaughns* court concluded,

> it is certainly questionable whether the Supreme Court intended in *Croson* to change such settled law in school desegregation cases rather radically in the absence of explicit statement of that intention.
>
> It is significant, too, that two justices writing separate opinions in *Croson* drew a distinction between school desegregation actions and other governmental conduct to which strict scrutiny applies.

742 F.Supp. at 1296.[4]

Strict scrutiny analysis is applicable under the Fourteenth Amendment where state action has created "[a]ny preference based on racial or ethnic criteria." *Wygant*, *supra*, 476 U.S. at 273, quoting *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980). In the present case, the challenged race-conscious policy is race-neutral and does not provide preferential treatment to any group on the basis of race. Strict scrutiny analysis is therefore not applicable.

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[4] In this Court's recent decision in *Board of Education of Oklahoma City Public Schools v. Dowell*, —— U.S. ——, 111 S. Ct. 630 (1991), the Court directed a District Court to evaluate a school board's Student Reassignment Plan (SRP), which provided for student busing and faculty and staff integration, under the Equal Protection guidelines set forth in *Washington v. Davis*, 426 U.S. 229 (1976) and *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Neither the Court's opinion nor the lower court opinions in that case specified how the faculty and staff integration policy was implemented. Nevertheless, the Court, in remanding the case, took effort to specify the Equal Protection guidelines which should govern the District Court's evaluation of the SRP. Significantly, the Court did not instruct the lower court to use the strict scrutiny standard set forth in *Wygant* and *Croson*.

II. EVEN IF THE BOARD'S STAFF RACIAL BALANCE POLICY WERE SUBJECT TO THE STRICT SCRUTINY STANDARD, THE POLICY DOES NOT VIOLATE THE FOURTEENTH AMENDMENT SINCE THE POLICY IS SUPPORTED BY A COMPELLING GOVERNMENTAL INTEREST AND IS NARROWLY TAILORED TO FURTHER THAT INTEREST

A. The Policy Is Supported By A Compelling Governmental Interest

Plaintiffs appear to argue that remedying past discrimination (either employment or school segregation) is the *only* possible compelling governmental interest that could justify the policy on staff racial balance. This argument is wrong. The Fourteenth Amendment places an affirmative duty on the Board to operate an integrated public school system, *Green v. County School Board*, 391 U.S. 430 (1968), and the *Bronson* Consent Decree specifically requires that the Board maintain and enforce its staff assignment policy. In this context, it is clear that achieving and maintaining racial diversity among faculty at each of the Board's schools is an important component in its operation of a unitary public school system and, therefore, serves a compelling governmental interest.

Moreover, the goals expressed by the Board when it originally adopted the policy articulate the compelling interest which justifies the policy. One goal of the Board's policy is to provide quality integrated education by reducing racial isolation among faculty. Under the policy, the number of minority teachers in each school reflects the overall percentage of minority teachers employed in the district at either the primary or secondary level. Another goal of the policy is to provide varied role models for all children in the Cincinnati Public Schools as part of the students' quality integrated education. (See District Court Opinion at p. 23a.) These goals are significantly different than the proffered goals found inadequate in *Wygant*.

In *Wygant*, "the hiring goal that the layoff provision was designed to safeguard was tied to the percentage of minority *students* in the school district, *not* to the percentage of qualified minority teachers within the relevant labor pool." The disparity between those percentages was not probative of employment discrimination and, therefore, could not properly provide the basis for a race-conscious remedy. *Wygant*, *supra*, 476 U.S. at 294 (O'Connor, J., concurring).

Furthermore, the goal of hiring and retaining the same percentage of minority teachers as there were minority students in the district was intended to ensure role-models for those minority students in order to remedy past "societal" discrimination. In contrast, the goal in the present case is to have each school's faculty reflect the racial diversity of the entire district's faculty. Consequently, each school's faculty will be integrated and black and white students will have role models of both races.

As Justice O'Connor noted in *Wygant*, "the goal of providing role models discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty." 476 U.S. at 288 n.*. Quality integrated education requires a racially diverse faculty. "The avoidance of racially identifiable faculties is critical to a desegregation plan . . . which relies heavily on magnet schools." *Vaughns*, 742 F. Supp. at 1292. If the black Plaintiff teachers presently teaching at Sands, an "alternative" Montessori elementary school, were permitted to transfer to other schools, the faculty of Sands would be virtually *all white*. Over the past fifteen years, the staff racial balance policy has been effective in keeping such schools from becoming racially identifiable by the composition of the faculty.

B. The Policy Is Narrowly Tailored

In considering whether a policy is narrowly tailored to meet a compelling interest, this Court has stated that it will look to "the necessity for the relief and the efficacy

of alternative remedies; the flexibility and duration of the relief including the availability of waiver provisions; the relationship of the numerical goals in the relevant labor market; and the impact of the relief on the rights of third parties." *United States v. Paradise*, 480 U.S. 149, 171 (1987).

In *Croson*, *supra*, the Court concluded that the city's minority set-aside plan was not narrowly tailored to meet a compelling governmental interest since various race-neutral measures could have achieved the goal of increasing minority participation in construction contracts as well as the racial preference measure could. In addition, the Court found that the fixed, 30% minority set-aside was a rigid quota that was not narrowly tailored to any goal. *Croson*, 488 U.S. at 486.

In the plurality opinion in *Wygant*, *supra*, Justice Powell concluded that the racial-preference teacher layoff plan was insufficiently tailored because less intrusive means were available (such as the adoption of hiring goals). *Wygant*, *supra*, 476 U.S. at 283-84. In her concurring opinion in *Wygant*, Justice O'Connor concluded that the layoff measure was not narrowly tailored because it was tied to the percentage of minority students in the district and not to the percentage of qualified minority teachers within the relevant labor pool. 476 U.S. at 294 (O'Connor, J., concurring).

Contrary to the race preference plans in *Croson* and *Wygant*, the Board's staff racial balance policy meets the standards set forth in *Paradise*. First, the necessity for the relief has been determined since the Board's policy is no longer voluntary, but rather has been incorporated in the *Bronson* consent Decree as a fair and reasonable remedy for the *Bronson* plaintiffs' allegations that the Board was unlawfully operating a dual, segregated public school system. Second, in its implementation, the policy has proven to be flexible. The Board's policy in the present case is flexible because it permits a range of

minority teachers in any individual school of 5% above or below the district-wide figure.[5] Like the contested policy in *Vaughns*, *supra*, the policy avoids the use of "fixed mathematical ratios or rigid numerical quotas." *Id.* Furthermore, that percentage range is properly tied to the percentage of minority faculty at the primary and secondary levels in the district. Finally, the implementation of the policy has adversely affected only a small number of teachers, both African-American and white, but has not imposed severe economic consequences, such as loss of income, seniority, or promotions. Like the *Vaughns* policy but unlike the *Wygant* layoff provision, the Board's policy does not impose

> severe economic or other severe consequences upon individuals. No teacher has ever suffered a layoff, a reduction in pay, or a loss of seniority or professional status as a result of the seniority override. Involuntarily transferred teachers are reassigned to similar positions at the same levels of income, seniority, and professional status. They, of course, may not like such transfers. A transfer of a relatively senior teacher from one school to another may, at best, be inconvenient and often genuinely disruptive. . . . Such concerns are not trivial. However, they do not rise to a level of deprivation or disruption such as that caused by the loss of a job in *Wygant* and the deprivation of an opportunity to compete for a construction contract in *Croson*. The latter are far

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[5] As noted above, the *Bronson* court in February 1992 "dissolve[d] its jurisdiction over that aspect of the consent decree (Section 5) dealing with the maintenance and enforcement of the staff racial balance policy." (Decision and Entry, February 4, 1992). Subsequently, the policy was modified to provide for even greater flexibility. The revised policy will permit a range of minority teachers in any individual school of 10% above or below the district-wide figure, and will recognize that in a particular school year, certain schools may not be in compliance. Moreover, the new collective bargaining provision concerning teacher transfers will prevent minority teachers from being "trapped" at alternative schools, as plaintiffs allege has occurred under the former policy.

> greater intrusions into the lives of individuals affected by a race-conscious policy than are the consequences of involuntary transfer under the Board's policy.

Vaughns, *supra* at 1303-04. *See also* the Third Circuit's decision in *Kromnick*, *supra*, 739 F.2d at 907 (Faculty assignment plan was "narrowly tailored" for many of the same reasons cited subsequently in *Vaughns*). In sum, the policy is narrowly tailored to achieve its compelling governmental goal.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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